

McAVOY AMAYA & REVERO ATTORNEYS

MICHAEL J. MCAVOYAMAYA, ESQ. (14082)

TIMOTHY E. REVERO (14603)

400 S. 4th Street, Suite 500

Las Vegas, NV 89101

Telephone: 702.685.0879

Facsimile: 702.995.7137

Mike@mrlawlv.com

Tim@mrlawlv.com

Attorneys for Petitioner

Electronically Filed
Apr 27 2021 12:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT OF NEVADA

* * * *

STATE OF NEVADA,

Petitioner.

v.

BRECK SMITH,

Respondents.

NO.: 82696

**APPELLEE'S MOTION TO
DISMISS APPEAL FOR LACK OF
SUBJECT MATTER
JURISDICTION**

COMES NOW, Appellee BRECK SMITH, by and through his attorneys of record, Michael J. McAvoy-Amaya, Esq., and Timothy E. Revero, Esq., hereby submits this Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction.

This response is made pursuant to the following memorandum of points and authorities and other pleadings and papers filed herein.

Dated this 27th day of April, 2021.

/s/ Michael J. McAvoy-Amaya

MICHAEL J. MCAVOYAMAYA, ESQ.

Nevada Bar No.: 14082

Attorney for Appellee

MEMORANDUM OF POINTS AND AUTHORITIES

I. UNTISPUTED FACTS PERTINENT TO THIS MOTION.

Breck Smith is an inmate who is no longer in lawful custody of the Nevada Department of Corrections (“NDOC”). Breck was convicted of burglary in 2008 and charged as a habitual criminal. *See* PSI Report, attached as **Exhibit 1**, at 3-7. Breck was paroled in 2017. *Id.* at 8. Breck was arrested on new charges of attempted burglary on March 22, 2018. *See* Criminal Bindover Packet, attached as **Exhibit 2**, at 2. Breck was almost immediately remitted into NDOC custody for a suspected parole violation. *See* Parole Board Documents, attached as **Exhibit 3**, at 6. After the Las Vegas Metropolitan Police Department (“LVMPD”) issued an arrest report and submitted to the Nevada Department of Public Safety, Division of Parole and Probation (“NDPP”), the NDPP ordered a NDPP investigation into whether or not there was probable cause to believe that Breck had violated the terms of his parole. *Id. see also* NDPP Probable Cause Violation Report, attached as **Exhibit 4**, at 1.

On March 28, 2018, the investigating officers of the NDPP issued their parole violation report. *Id.* The report noted that “On March 22, 2018, Breck Smith was arrested by the Las Vegas Metropolitan Police Department and charged with Attempt Burglary and Possession of Burglary Tools in Case# 18FOS188X in addition to four counts of Violation of Parole. The subject was placed in custody in the Clark County Detention Center and bail was set at \$7,000.” *Id.* The report also noted that Breck was two months in arrears for his financial obligations to the NDPP, and had not provided proof of required substance abuse evaluations. *Id.* The investigators reported that the arrest was Breck’s first major parole violation, but that the arrest was concerning to the NDPP, that Breck “has apparently fallen back into his old behavior,” and that the NDPP investigators felt that “the subject is not an appropriate candidate for continued Community supervision.” *Id.* Breck was in the custody of the Clark County Detention Center, and the NDPP “recommended that a Retake Warrant be issued and the subject's parole be revoked.” *Id.* at 2.

In or around April 11, 2018, the Nevada Board of Parole Commissioners (the “Board”) accepted the advice of the NDPP and issued the retake warrant. *See Ex. 3*, at 6. A NDPP “Notice

1 of Rights” form dated March 30, 2018, indicates that Breck was remanded back into the custody
2 of NDOC sometime between March 30, 2018 and April 11, 2018, when the retake warrant was
3 issued. *Id. see also* NDPP Notice of Rights, attached as **Exhibit 5**, at 1. The Notice states that
4 Breck’s “return to The Nevada Department of Corrections to answer charges of parole violation
5 before the Nevada Board of Parole Commissioners was determined at your Preliminary Inquiry
6 Hearing.” *See Ex. 5*, at 1. However, the form fails to indicate a date that the Preliminary Inquiry
7 Hearing to determine probable cause to detain Breck pending a parole violation hearing was held.
8 *Id.*

9 Despite Breck being remanded into NDOC custody and being housed at the High Desert
10 State Prison, it appears that neither the NDPP nor the Board gave Breck his Preliminary Inquiry
11 probable cause hearing, instead imprisoning Breck until his parole revocation hearing without due
12 process, while simultaneously denying him his right bail on new offense. *Id.* at 1-13. The Board
13 held numerous hearings on the revocation of Breck’s parole. *See Ex. 3*, at 4-13. However, at every
14 hearing held the Board deferred issuing a decision on whether Breck violated his parole. *Id.*

15 Breck plead guilty to the new charge of attempted burglary on June 24, 2019. *Id.* at 3. On
16 June 25, 2019, the Board revoked Breck’s parole for one year to July 1, 2020, despite the fact that
17 Breck had been imprisoned in NDOC for over a year for his parole violation. *See Ex. 3*, at 4. The
18 Board’s failure to hold the parole revocation hearing and enter a decision to revoke Breck’s parole
19 within 60 days of Breck’s remand into NDOC custody caused Breck to incur over one year of
20 “dead time” where Breck was imprisoned for a parole violation without due process in violation
21 of Nevada’s parole statutes. *Id.* On January 12, 2021, Smith, with help from counsel, filed an
22 Emergency Petition for Writ of Habeas Corpus, Mandamus, and/or Prohibition to Correct Illegal
23 Sentence Imposed by the Board, and requesting that this Court order the NDOC to recalculate his
24 time served under both the parole violation and the current sentence back to sixty (60) after his
25 remand to NDOC custody.

26 On February 17, 2021, this Court issued a Findings of Fact and Conclusions of Law and
27 Order granting Breck the relief he requested. *See* FFCLO, 2/17/21, attached as **Exhibit 6**, at 1.
28 This Court ordered NDOC to recalculate Breck’s time served sentence credits on the one year

1 parole violation penalty over a year. *Id.* at 5. The Clerk issued an automated certificate of service
2 of the order noting that the order was served on February 17, 2021. *Id.* at 8. Thirty-seven (37) days
3 later, on March 26, 2021, the State filed its Notice of Appeal in this matter. *See* Notice of Appeal,
4 attached as **Exhibit 7**, at 1; *see also* Docketing Statement, at 7. Because the State received service
5 of the order on February 17th, the State’s notice of appeal is untimely and as such, this Court has
6 no jurisdiction to address this appeal.

7 **II. ARGUMENT**

8 The State’s Notice of Appeal is untimely pursuant to NRAP 4, which provides that:

9 In a civil case in which an appeal is permitted by law from a district court, the notice
10 of appeal required by Rule 3 shall be filed with the district court clerk. Except as
11 provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written
12 judgment or order, and *no later than 30 days after the date that written notice of*
13 *entry of the judgment or order appealed from is served.* If an applicable statute
14 provides that a notice of appeal must be filed within a different time period, the
15 notice of appeal required by these Rules must be filed within the time period
16 established by the statute.

17 *See* NRAP 4(a)(1)(emphasis added).

18 NRAP 4 further instructs that “A judgment or order is entered for purposes of this Rule
19 *when it is signed by the judge or by the clerk, as the case may be, and filed with the clerk.*” *See*
20 NRAP 4(a)(3). Here, it is undisputed that the Findings of Fact, Conclusions of Law and Order was
21 signed by this Court and filed with the clerk on February 17, 2021, as Respondents’ Notice of
22 Appeal correctly reflects. *See Ex. 7*, at 1. This is further supported by the fact that the Clerk issued
23 an automated certificate of service noting a “Service Date: 2/17/2021” on all parties. *See Ex. 6*, at
24 7. As such, Respondents’ Notice of Appeal was filed thirty-seven (37) days after entry of the order
25 granting Breck relief. *Id.*

26 The Nevada Supreme Court recently affirmed the plain language of NRAP 4, and the fact
27 that it is a jurisdiction statute precluding review regardless of the merits of an appeal in *Byrd v.*
28 *Byrd*, No. 81198, (Nev. Aug. 14, 2020). *See* Order, Case No. 81198, 8/14/20, attached as **Exhibit**
8, at 1. In *Byrd*, the Nevada Supreme Court noted that:

1 Notice of entry of the challenged orders was served electronically on March 18 and
2 27, 2020, respectively. Thus, the notices of appeal were due to be filed in the district
3 court by April 17 and 27, 2020, respectively. *See* NRAP 4(a)(1); NRAP
4 26(a)(1)(C); NRCp 6(a)(1)(C). However, appellant did not file the notice of appeal
5 in the district court until May 14, 2020, well past the deadline.

6 *Id.*

7 The Nevada Supreme Court “lacks jurisdiction” over untimely appeals, and “is unable to
8 extend the deadline to file a notice of appeal” after it has passed. *Id.* at 2-3 *citing* NRAP 26(b)(1)(A)
9 C. [T]he court may not extend the time to file a notice of appeal except as provided in Rule 4(c).”) *see also* *Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 330, 741 P.2d 432 (1987).
10 Here, like in *Byrd*, the notice of entry of the order appealed was served electronically on February
11 17, 2021. *See* **Ex. 7**, at 1; *see also* **Ex. 6**, at 7. The Notice of Appeal was filed thirty-seven (37)
12 days later. Neither this Court, nor the Nevada Supreme Court may extend the deadline to file the
13 Notice of Appeal. As such, Appellants’ appeal is ultimately and must be dismissed for lack of
14 jurisdiction.

15 **III. CONCLUSION**

16 Therefore, based on the foregoing, Petitioner respectfully request this Court DISMISS
17 Appellants’ appeal for lack of subject matter jurisdiction.

18 Dated this 27th day of April 2021.

19 /s/ Michael J. McAvoy-Amaya, Esq.

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MICHAEL J. MCAVOY-AMAYA, ESQ.

21 Nevada Bar No.: 14082

22 *Attorney for Appellee*
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4 **CERTIFICATE OF SERVICE**

5 Pursuant to NRCP 5(b), I certify that I am an employee of and that on April 27, 2021, I
6 caused the foregoing document entitled **MOTION TO DISMISS APPEAL FOR LACK OF**
7 **SUBJECT MATTER JURISDICTION** to be served upon those persons designated by the
8 parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District
9 Court eFiling System in accordance with the mandatory electronic service requirements of
10 Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules. Non-parties
11 will be served by mail.
12

13 AARON D. FORD
14 Attorney General
15 Katrina A. Samuels (Bar No. 13394)
16 Deputy Attorney General
17 State of Nevada
18 Office of the Attorney General
19 555 E. Washington Ave., Ste. 3900
20 Las Vegas, Nevada 89101-1068
(702) 486-3770 (phone)
(702) 486-2377 (fax)
KSamuels@ag.nv.gov
Attorneys for Appellants

21 Dated this 27th day of April, 2021.

22 /s/ Michael J. McAvoy-Amaya
23 MICHAEL J. MCAVOY-AMAYA, ESQ.
24 Nevada Bar No.: 14082
25 *Attorney for Appellee*
26
27
28

Exhibit 1



PRESENTENCE INVESTIGATION REPORT

The Honorable Kathleen E. Delaney
Department XXV, Clark County
Eighth Judicial District Court

Date Report Prepared: July 26, 2019

Prosecutor: Madilyn Cole, Chief DDA
Defense Attorney: Thomas A. Ericsson, Retained

PSI: 576274

I. CASE INFORMATION

Defendant:	Breck Warden Smith	PCN:	25742615
Case:	C-19-337302-1	Offense Date:	03-22-18
ID:	806628	Arrest Date:	03-22-18
P&P Bin:	1000157132	Plea Date:	06-24-19, Guilty per the Alford Decision
		Sentencing Date:	08-12-19

II. CHARGE INFORMATION

Offense: Attempt Burglary (F)
NRS: 205.060, 193.330
NOC: 50442
Category: C
Penalty: By imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years. In addition to any other penalty, the court may impose a fine of not more than \$10,000, unless a greater fine is authorized or required by statute.

PRESENTENCE INVESTIGATION REPORT
BRECK WARDEN SMITH
CC#: C-19-337302-1

Page 2

III. DEFENDANT INFORMATION

Address: 3068 Tarpon Drive #208
City/State/Zip: Las Vegas, Nevada 89121
NV Resident: Yes
SSN: 530-92-1306
POB: St. Louis, Missouri
Date of Birth: 08-01-66
Age: 52
Phone: (702) 801-8049 (cell)
Driver's License: 1602768912
State: Nevada
Status: Valid

FBI: 569572FA0
SID: NV00521056
Aliases: Ernest Lee Nichols, Breck Warren Smith, Breck Smith, Breck W. Smith, Brecky Smith, Mickey Juliano Smith, Speck Warden Smith, Ernest Lee Nicholas, Ernest Nichols, Ernest L. Nichols
Additional SSNs: 530-90-1306, 530-88-2337
Additional DOBs: 08-01-68, 04-15-65
Additional POB: None
Alien Registration: N/A
US Citizen: Yes
Notification Required per NRS 630.307: No

Identifiers:

Sex: M **Race:** W **Height:** 5'9" **Weight:** 180

Hair: Black **Eyes:** Brown

Scars: None reported

Tattoos (type and location): Skulls and sun tribal on left arm; skulls and guitar on right arm; Chelsea on chest (all unverified).

Social History: The following social history is as related by the defendant on July 15, 2019 and is unverified unless otherwise noted:

Childhood/Family: The defendant was raised by his mother from the age of three after his parents divorced. He visited with his father during the summers in California. He had contact with extended family members. There was no drug or alcohol abuse in the home. Neither parent was incarcerated. He was not physically or sexually abused or neglected as a child.

Marital Status: Married

Children: (2) adults

Custody Status of Children: N/A

Monthly Child Support Obligation: N/A

Employment Status: The defendant has been unemployed since March 22, 2018. Prior employment was as a self-employed music teacher. He also worked as a food served at Paymons Mediterranean Café and Hookah Lounge from May 2017 to March 2018. He worked as a musician beginning in the 1980's and continued throughout his lifetime.

Number of Months Employed Full Time in 12 months Prior to Commission of Instant Offense: 10

Age at first arrest: 19 or younger ☐ 20- 23 ☒ 24 or older ☐

Income: None reported

Other Sources: Family Support

PRESENTENCE INVESTIGATION REPORT
BRECK WARDEN SMITH
CC#: C-19-337302-1

Page 3

Assets: \$8,000 (car, music equipment)

Debts: None reported

Education: The defendant graduated from high school in 2015 while incarcerated. He also obtained his GED in 1995. Mr. Smith enrolled in classes in UC Berklee for band camps and he took one semester in music theory and composition. He did not receive a degree.

Military Service: The defendant did not serve in the military.

Health and Medical History: Mr. Smith is in good health with no significant concerns.

Mental Health History: None reported.

Gambling History: None reported

Substance Abuse History: The defendant first used alcohol at the age of 13. He quit all use of controlled substances on March 1, 2007. He has never participated in a drug counseling or treatment program. He stated alcohol and drugs are not problematic and denied he was under the influence of any controlled substances at the time of the instant offense.

Gang Activity/Affiliation: None reported.

IV. CRIMINAL RECORD

As of July 22, 2019, records of the Las Vegas Metropolitan Police Department, the National Crime Information Center and the Federal Bureau of Investigation reflect the following information:

CONVICTIONS- FEL: 17 GM: 0 MISD: 8

INCARCERATIONS- PRISON: 13 JAIL: 6

SUPERVISION HISTORY:

CURRENT- Probation Terms: 0 Parole Terms: 0

PRIOR TERMS:

Probation- Revoked: 4 Discharged: Honorable: 0 Other: 0

Parole- Revoked: 9 Discharged: Honorable: 3 Other: 2

Exhibit 2

ORIGINAL

LAS VEGAS JUSTICE COURT
FILED IN OPEN COURT

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

AUG 30 2018

BY

CLERK

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRECK WARDEN SMITH #806628,

Defendant.

CASE NO: 18F05188X

DEPT NO: 1

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of ATTEMPT BURGLARY (Category C Felony - NRS 205.060, 193.330 - NOC 50442); ATTEMPT INVASION OF THE HOME (Category C Felony - NRS 205.067, 193.330 - NOC 50446) and POSSESSION OF BURGLARY TOOLS (Gross Misdemeanor - NRS 205.080 - NOC 50441), in the manner following, to-wit: That the said Defendant, on or about the 22nd day of March, 2018, at and within the County of Clark, State of Nevada,

COUNT 1 - ATTEMPT BURGLARY

did willfully, unlawfully, and feloniously attempt to enter, with intent to commit larceny, that certain building located at 10091 Edwardian Street, Las Vegas, Clark County, Nevada, occupied by LEOMER SARMIENTO, by knocking on doors and windows.

COUNT 2 - ATTEMPT INVASION OF THE HOME

did willfully, unlawfully, and feloniously attempt to forcibly enter an inhabited dwelling, to wit: 10091 Edwardian Street, Las Vegas, Clark County, Nevada, without permission of the owner, resident, or lawful occupant, to wit: LEOMER SARMIENTO, by knocking on doors and windows.

COUNT 3 - POSSESSION OF BURGLARY TOOLS

did willfully and unlawfully have in his possession, a tool, to wit: a utility vest and/or clipboard and/or a badge, which is commonly used for the commission of a burglary, invasion of the home, larceny, and/or other crime, under circumstances evincing an intent to use or employ said tools in the commission of a crime.

Exhibit 3

**STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER GRANTING PAROLE**

SMITH, BRECK WARDEN	77141	2008-042473	ISOC-U2-C-19-B	07/15/2020
Inmate Name	NDOC Number	Booking #	Location	Date

It is the Order of the Board that Parole is GRANTED. The effective date of parole is: 07/01/2020.

Release to the community or to a consecutive sentence is authorized on the above specified date. If "when eligible" is indicated, release is authorized on or after the date of this hearing upon attaining minimum eligibility, as determined by the Nevada Department of Corrections (NDOC).

You are expected to program and/or work constructively regardless of institutional setting, and you are expected to abide by the rules of the NDOC. Failure to work and/or program constructively, or violation of the rules of the NDOC may result in the rescission of this order and denial of parole.

NOTE: A parolee who violates a condition of his or her parole forfeits all or part of the credits for good behavior earned by the parolee after release on parole at the discretion of the Board. A parolee whose parole is revoked for having violated a condition of parole forfeits all credits for good behavior previously earned to reduce his or her sentence pursuant to NRS 209. The Board may restore any forfeited credits at its discretion.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

*Controlling sentence denoted by *, Case #: Count: Offense Description:*

232319; 1; BURGLARY

232113; 1; HABITUAL CRIMINAL (GREATER)

240508; 1; HABITUAL CRIMINAL (GREATER)

232109; 1; HABITUAL CRIMINAL (GREATER)

Reason(s) for action:

Grant Reason: The inmate must serve a consecutive sentence.

Recommendation of the panel who conducted the hearing: Grant Parole

Chairman Christopher Dericco, Grant Parole

Commissioner Tony Corda, Grant Parole

Commissioner Mary Baker, Grant Parole

The final action was ratified by the following Members of the Board of Parole Commissioners:

Chairman Christopher Dericco, Grant Parole

Commissioner Mary Baker, Grant Parole

Commissioner Tony Corda, Grant Parole

Commissioner Susan Jackson, Grant Parole


FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by MS ALLING at 7/22/2020 8:15 AM

**STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER TAKING NO ACTION**

SMITH, BRECK WARDEN	77141	2008-042473	ISCO-U2-C-19-B	04/21/2020
Inmate Name	NDOC Number	Booking #	Location	Date

No Action was taken on the above referenced inmate at the parole hearing held on this date.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

*Controlling sentence denoted by *, Case #: Count: Offense Description:*

232319; 1; BURGLARY
232113; 1; HABITUAL CRIMINAL (GREATER)
240508; 1; HABITUAL CRIMINAL (GREATER)
232109; 1; HABITUAL CRIMINAL (GREATER)

Reason(s) for action:

Reason for No Action: Public Meeting Cancelled due to COVID-19 Emergency Declaration

Recommendation of the panel who conducted the hearing: No Action

Commissioner Michael Keeler; No Action

NOTE: A 'No Action' order does not require ratification by a majority of the Board.



FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by JME:ADOR at 4/21/2020 11:50 AM

STATE OF NEVADA
BOARD OF PAROLE COMMISSIONERS
CERTIFICATION OF ACTION
PAROLE VIOLATION HEARING

INMATE NAME	NDOC NUMBER	BOOKING#	LOCATION	DATE
SMITH, BRECK WARDEN	77141	2008-042473	HDSP-U7-B-11-B	06/25/2019

Affected Sentences (Controlling sentence denoted by *)

232319;1;BURGLARY
232113;1;HABITUAL CRIMINAL (GREATER)
240508;1;HABITUAL CRIMINAL (GREATER)
*232109;1;HABITUAL CRIMINAL (GREATER)

Warrant # 42117

Warrant Date 04/11/2018

Arrest Date: 03/22/2018

Was the PI Hearing conducted or waived? Waived

Was the notice of rights executed? Yes

Counsel Type: Retained / Public Defender

Represented By:

Richards

Absconder

No

Stop Date:

Restart Date:

CHARGES, PLEAS and FINDINGS

Charges	Parolee Plea	Board Finding	Other Action
Conduct	<u>Guilty</u> / Not Guilty	<u>Guilty</u> / Not Guilty	
Laws	<u>Guilty</u> / Not Guilty	<u>Guilty</u> / Not Guilty	
Financial Obligations	<u>Guilty</u> / Not Guilty	<u>Guilty</u> / Not Guilty	Withdrawn by P&P
Mand SA eval, prof treat	<u>Guilty</u> / Not Guilty	<u>Guilty</u> / Not Guilty	Withdrawn by P&P

ACTION (indicate one):

<input checked="" type="checkbox"/>	Parole is revoked to: <u>07/01/2020</u>	WARRANT IS SUSTAINED. Parolee is returned to prison for reasons set forth in the retake warrant of which this order is part. Pursuant to NRS 213.1519, all good time credits (stat credits) earned prior to the date of revocation are hereby forfeited. <u>The Board has restored All credits.</u>
<input type="checkbox"/>	Continue on Parole: ___ Immediately ___ Upon Plan Approval ___ At Date Parole Credit Forfeiture:	WARRANT IS QUASHED. Parole is continued with the same conditions unless specified as follows: The Board orders the forfeiture of ___ credits earned while on parole for having been found guilty of a violation of parole.
<input type="checkbox"/>	No Action Taken	

Evidence Relied Upon:

- ☒ Guilty Plea (where applicable)
- ☒ Report of P&P: Violation Report dated 3/28/2019
- ☒ Police Report: LVMPD Arrest Report dated 3/22/2018 (2 pages)
- ☒ Other: CCDC Inmate In-Custody Status 4/07/2018 (2 pages)
- ☒ Restitution Report: P&P Restitution Account 2017
- ☒ Other: WestCare 4/03/2018
- ☒ Other: ASAM Dimension Acute Intoxication and Withdrawal (7 pages)
- Other:

Name of P&P Division Representative: Officer Stankus

Name of Parole Board Panel Members Present: Keeler, Christiansen, De La Torre via telephone

Reason for Revocation (where applicable): The Board heard substantial evidence which was presented to prove that you violated the above conditions of your parole by:

OFFENDER COMMITTED A NEW FELONY AND IS NOT AMENDABLE TO SUPERVISION AT THIS TIME

The votes of the members who ratified the final action are on file with the Executive Secretary of the Board.


FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

STATE OF NEVADA
BOARD OF PAROLE COMMISSIONERS
CERTIFICATION OF ACTION
PAROLE VIOLATION HEARING

SMITH, BRECK WARDEN 77141 2008-042473 HDSP-U7-A-33-B 08/07/2018
INMATE NAME NDOC NUMBER BOOKING# LOCATION DATE

Affected Sentences (Controlling sentence denoted by *)

232319;1;BURGLARY
232113;1;HABITUAL CRIMINAL (GREATER)
*232109;1;HABITUAL CRIMINAL (GREATER)
240508;1;HABITUAL CRIMINAL (GREATER)

Warrant # 42117

Warrant Date 04/11/2018

Arrest Date: 03/22/2018

Was the PI Hearing conducted or waived? Waived

Was the notice of rights executed? Yes

Counsel Type: Retained / Public Defender

Represented By: Cizhaski

Absconder

No

Stop Date:

Restart Date:

CHARGES, PLEAS and FINDINGS

Charges	Parolee Plea	Board Finding	Other Action
Conduct	Guilty / Not Guilty	Guilty / Not Guilty	
Laws	Guilty / Not Guilty	Guilty / Not Guilty	
Financial Obligations	Guilty / Not Guilty	Guilty / Not Guilty	
30. Mand SA eval, prof treat	Guilty / Not Guilty	Guilty / Not Guilty	

ACTION (indicate one):

<input type="checkbox"/>	Parole is revoked to: _____	WARRANT IS SUSTAINED. Parolee is returned to prison for reasons set forth in the retake warrant of which this order is part. Pursuant to NRS 213.1519, all good time credits (stat credits) earned prior to the date of revocation are hereby forfeited. <u>The Board has restored _____ credits.</u>
<input type="checkbox"/>	Continue on Parole: ____ Immediately ____ Upon Plan Approval ____ At Date _____	WARRANT IS QUASHED. Parole is continued with the same conditions unless specified as follows: _____ The Board orders the forfeiture of _____ credits earned while on parole for having been found guilty of a violation of parole.
<input checked="" type="checkbox"/>	No Action Taken	<u>Hearing rescheduled to September 25, 2018, pending new criminal charges</u>

Evidence Relied Upon:

Guilty Plea (where applicable)
Report of P&P: Violation Report dated 7/02/2018
Police Report: LVMPD Arrest Report dated 3/22/2018 (2 pages)
Police Report: CCDC Inmate In-Custody Status 4/07/2018 (2 pages)
Restitution Report: P&P Restitution Account 2017
Other: WestCare 4/03/2018
Other:
Other:

Name of P&P Division Representative: Sergeant Stankus

Name of Parole Board Panel Members Present: Keeler, Christiansen, DeRicca via telephone.

Reason for Revocation (where applicable): The Board heard substantial evidence which was presented to prove that you violated the above conditions of your parole by:

The votes of the members who ratified the final action are on file with the Executive Secretary of the Board.


FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

STATE OF NEVADA
BOARD OF PAROLE COMMISSIONERS
CERTIFICATION OF ACTION
PAROLE VIOLATION HEARING

INMATE NAME	NDOC NUMBER	BOOKING#	LOCATION	DATE
SMITH, BRECK WARDEN	77141	2008-042473	HDSP-U1-C-22-B	05/02/2018

Affected Sentences (Controlling sentence denoted by *)

232319;1;BURGLARY

232113;1;HABITUAL CRIMINAL (GREATER)

*232109;1;HABITUAL CRIMINAL (GREATER)

240508;1;HABITUAL CRIMINAL (GREATER)

Warrant # 42117

Warrant Date 04/11/2018

Arrest Date: 03/22/2018

Was the PI Hearing conducted or waived? Waived

Was the notice of rights executed? Yes

Counsel Type: Retained / Public Defender

Represented By: Cichoski

Absconder

No

Stop Date:

Restart Date:

CHARGES, PLEAS and FINDINGS

Charges	Parolee Plea	Board Finding	Other Action
Conduct	Guilty / Not Guilty	Guilty / Not Guilty	
Laws	Guilty / Not Guilty	Guilty / Not Guilty	
Financial Obligations	Guilty / Not Guilty	Guilty / Not Guilty	
30. Mand SA eval, prof treat	Guilty / Not Guilty	Guilty / Not Guilty	

ACTION (indicate one):

<input type="checkbox"/>	Parole is revoked to: _____	WARRANT IS SUSTAINED. Parolee is returned to prison for reasons set forth in the retake warrant of which this order is part. Pursuant to NRS 213.1519, all good time credits (stat credits) earned prior to the date of revocation are hereby forfeited. The Board has restored _____ credits.
<input type="checkbox"/>	Continue on Parole: ____ Immediately ____ Upon Plan Approval ____ At Date _____ Parole Credit Forfeiture: _____	WARRANT IS QUASHED. Parole is continued with the same conditions unless specified as follows: _____ The Board orders the forfeiture of _____ credits earned while on parole for having been found guilty of a violation of parole.
<input checked="" type="checkbox"/>	No Action Taken	Hearing rescheduled to August 7, 2018, pending new criminal charges.

Evidence Relied Upon:

Guilty Plea (where applicable)

Violation Report: Report from P&P dated 3-28-2018

Police Report: LVMPD Arrest Report dated 3-22-2018 (2 pages)

Other: CCDC Inmate In-Custody Status dated 4-7-2018 (2 pages)

Other:

Name of P&P Division Representative: Officer Billich

Name of Parole Board Panel Members Present: Keeler, Dericco, Jackson via telephone

Reason for Revocation (where applicable): The Board heard substantial evidence which was presented to prove that you violated the above conditions of your parole by:

The votes of the members who ratified the final action are on file with the Executive Secretary of the Board.


FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

Exhibit 4



4 case

VIOLATION REPORT
Date Report Prepared: March 28, 2018

**TO THE HONORABLE BOARD OF PAROLE COMMISSIONERS
CARSON CITY, NEVADA**

NAME: SMITH, Breck
FILE #: L17-1752
CC #: C232113
NDOC#: 77141

SUPERVISION GRANT: 03-07-2017
EXPIRATION: LIFE

CRIME: CT I: HABITUAL CRIMINAL (GREATER) (CATEGORY A FELONY)
SENTENCE: \$25 ADMINISTRATIVE ASSESSMENT FEE, \$150 DNA COLLECTION FEE, CC WITH C232109. MAXIMUM TERM OF LIFE WITH A MINIMUM PAROLE ELIGIBILITY OF 10 YEARS IN THE NEVADA DEPARTMENT OF CORRECTIONS.

I. VIOLATION:

Conduct; Laws: On March 22, 2018, Breck Smith was arrested by the Las Vegas Metropolitan Police Department and charged with Attempt Burglary and Possession of Burglary Tools in Case# 18F05188X in addition to four counts of Violation of Parole. The subject was placed in custody in the Clark County Detention Center and bail was set at \$7,000. The subject is scheduled to appear in the Las Vegas Justice Court on June 13, 2018.

Financial Obligations: On March 7, 2017, Mr. Smith was ordered to pay \$30 in monthly supervision fees. He is 2 months in arrears for a total of \$60. *Current office as of 4/26/18.*

Special Condition (3) Complete substance abuse evaluation within 30 days release from NDOC: Breck Smith was previously supervised by the Pahrump office and transferred to the Las Vegas office on or about August, 2017. Since that time, the subject has claimed he completed his substance abuse evaluation while in Pahrump however, to date, he has provided no verification that this has been completed.

II. RESPONSE TO SUPERVISION:

This is the subject's first major violation since being released to parole in March of 2017. The subject has not tested positive for any narcotics and has managed to maintain employment. However, his new arrest is most concerning to the Division. The subject is currently being supervised for four parole cases and he has apparently fallen back into his old behavior. Due to the subject's past criminal history with burglary offenses, the Division feels the subject is not an appropriate candidate for continued community supervision.

III. WHEREABOUTS AND AVAILABILITY:

Effective March 22, 2018, the subject is in custody in the Clark County Detention Center.

NAME: SMITH, Breck
FILE#: L17-1752

PAGE 2

IV. RECOMMENDATION:

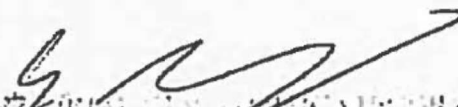
It is recommended that a Retake Warrant be issued and the subject's parole be revoked.


V. LEVEL OF SUPERVISION:

Maximum

Respectfully submitted:

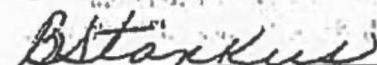
Supervisor Approved:

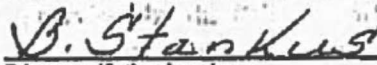

S. Brickey, DPS Officer
smbrikey@dps.state.nv.us
Division of Parole and Probation
Southern Command, Las Vegas, NV


M. LaPutt, DPS Sergeant
mlaputt@dps.state.nv.us
Division of Parole and Probation
Southern Command, Las Vegas, NV

Print name if other than above

Print name if other than above


S. Brandon, DPS Lieutenant
sbrandon@dps.state.nv.us
Division of Parole and Probation
Southern Command, Las Vegas, NV


B. Stankus
Print name if other than above

1000157132_7_VR
Violation Report- Parole.doc

Exhibit 5

STATE OF NEVADA
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF PAROLE AND PROBATION

NOTICE OF RIGHTS

You, SMITH, Breck, are herein advised that your return to The Nevada Department of Corrections to answer charges of parole violation before the Nevada Board of Parole Commissioners was determined at your Preliminary Inquiry Hearing held on _____, 20____, at _____
(Place)

You are further advised of your rights as follows:

1. Representation by retained counsel of your own choice and at your own expense. ☐ Yes ☐ No
(If Yes, list name and address of attorney.) (Initial) BS

2. Representation as an indigent by the State Public Defender. ☐ Yes ☐ No
(Please indicate on attached Affidavit and Application for Appointment of Counsel.) (Initial) BS

3. If our alleged parole violation is not based on a new conviction, you may present witnesses to testify in your behalf and you may confront witnesses who testified against you. (Initial) _____

4. It will be your responsibility to notify and pay the expenses of witnesses testifying in your behalf. Provide the names below: (Initial) BS

_____	_____
_____	_____
_____	_____

5. Name and agency of the witnesses you wish to confront: (If you intend to refute witness allegations, request they be present.) (Initial) BS

_____	_____
_____	_____
_____	_____

6. You may also present affidavits for the record. (Initial) BS

I hereby certify I have received the following documents:

A. Details and summary of alleged parole violations as charged.

B. Summary of Findings determined at my Preliminary Inquiry Hearing on:

_____, 20____, at _____
(Place)

C. A copy of this, my Notice of Rights.

Signed [Signature]

Date 3-30-18

Witness [Signature]

Date 05/30/18

Exhibit 6

Heather S. Linn
CLERK OF THE COURT

FCL
McAVOY AMAYA & REVERO ATTORNEYS
MICHAEL J. MCAVOYAMAYA, ESQ. (14082)
TIMOTHY E. REVERO (14603)
400 S. 4th Street, Suite 500
Las Vegas, NV 89101
Telephone: 702.685.0879
Facsimile: 702.995.7137
Mike@mrlawlv.com
Tim@mrlawlv.com
Attorneys for Petitioner

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY OF NEVADA

* * * *

In the Matter of the Application of,

BRECK SMITH, #
For a Writ of Habeas Corpus.

CASE NO.: C-19-337302-1

Dept. XXV

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER

DATE OF HEARING: JANUARY 27, 2021
TIME OF HEARING: 3:00 PM

THIS CAUSE having come up for hearing before the Honorable KATHLEEN DELANEY, District Judge, on the 27th day of January, 2021, the Petitioner being represented by MICHAEL J. MCAVOYAMAYA, ESQ, of MCAVOY AMAYA & REVERO ATTORNEYS, the Respondent being represented by KATRINA A. SAMUELS, of the Office of the Nevada Attorney General, and the Court having considered the matter, including the briefs, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioner was arrested, convicted, and sentenced under the habitual offender statute in 2008.
2. Petitioner was granted parole for the 2008 convictions on March 7, 2017.
3. On March 22, 2018, Petitioner was arrested on new charges of attempted burglary, possession of burglary tools, and parole violation.



1 15. When “a determination has been made that probable cause exists for the continued
2 detention of a paroled prisoner, the Board shall consider the prisoner's case within 60 days after
3 his return to the custody of the Department of Corrections or his or her placement in residential
4 confinement pursuant to subsection 1.” *See Nev. Rev. Stat. § 213.1517(3).*

5 16. The sixty (60) day parole revocation hearing requirement is intended to ensure that
6 a parolee believed to have violated the terms of his parole is not deprived of his constitutionally
7 protected liberty interests without due process.

8 17. There is an exception to NRS § 213.1517(3) when “probable cause for continued
9 detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge,”
10 which permits the Parole Board to either “consider the prisoner's case under the provisions of
11 subsection 3 or defer consideration until not more than 60 days after his or her return to the custody
12 of the Department of Corrections following the final adjudication of the new criminal charge.” *See*
13 *Nev. Rev. Stat. § 213.1517(4).*

14 18. Petitioner argued in his briefs and at the hearing that the plain language of both the
15 sixty (60) day parole revocation hearing requirement in NRS § 213.1517 Subsection 3, and its
16 exception in Subsection 4, impose a duty on the Parole Board to hold the parole revocation hearing
17 within sixty (60) days of the parolee’s return to NDOC custody.

18 19. The State argued in its response brief and the hearing that the exception in NRS §
19 213.1517 Subsection 4 permits the Parole Board to defer the parole revocation hearing until sixty
20 (60) days after the adjudication of the parolee’s new charges.

21 20. The Court finds, based on the plain language of NRS § 213.1517, that Petitioner’s
22 interpretation of the statute is correct. NRS § 213.1517(4) does not grant the Parole Board the
23 authority to impose indefinite terms of imprisonment in the custody of NDOC by taking custody
24 of a parolee, and then deferring the parole revocation hearing until after the parolee is convicted
25 on the new charges.

26 21. The Court holds that the plain language of NRS §§ 213.1517 Subsections 3 and 4
27 impose a duty on the Parole Board to hold the parole revocation hearing within sixty (60) days of
28 a parolee’s return to the custody of NDOC upon a finding a probable cause that the terms of parole
have been violated, regardless of whether there are new charges pending. The Parole Board may
only defer the parole revocation hearing if the parolee remains in the custody of the jurisdiction
where the new charges have been committed until final adjudication of the new charges. *See Nev.*

1 Rev. Stat. § 213.1517(4). Upon conviction on the new charges, the Parole Board must then hold
2 the parole revocation hearing within sixty (60) days of the parolee's return to NDOC custody. *Id.*

3 22. The Court acknowledges and understands the State's argument and requested
4 interpretation of the statute that the sixty (60) day time period to hold the parole revocation hearing
5 run from the date of conviction, but finds that the only way that the State's interpretation
6 withstands scrutiny is by ignoring the plain language in NRS § 213.1517 subsection 3 and 4 stating
7 that the sixty (60) day period to hold the parole revocation hearing begins to run upon the parolee's
8 return to NDOC custody, or imposition of residential confinement.

9 23. This Court is not permitted to "ignore as meaningless" words and clauses in a
10 statute or law. *State ex rel. Thatcher v. Reno Brewing Co.*, 42 Nev. 397, 405, 178 P. 902, 903
11 (1919). There is a presumption that the framers of our laws intended "to give force and effect, not
12 only to the main legislative intent of the act but also to its several parts, words, clauses, and
13 sentences, and chose appropriate language to express their intention." *Id.* That "presumption is
14 removed only when it appears, from a construction of a statute as a whole, effect cannot be given
15 to the paramount purpose unless particular words or clauses are rejected, or without limiting or
16 expanding their literal import." *Id.*

17 24. The State has failed to overcome the presumption that the plain language in NRS §
18 213.1517 Subsections 3 and 4 means that the Parole Board must hold the parole revocation hearing
19 ~~be held~~ within sixty (60) days of the parolee's return to NDOC custody. *Id.*

20 25. For these reasons, this Court holds that the Parole Board exceeded its authority
21 pursuant to NRS § 213.1517, deferring the parole revocation well beyond sixty (60) days after
22 Petitioner's return to NDOC custody.

23 26. Petitioner also raised the issue of the Parole Board's procedure of taking custody
24 of Petitioner and deferring the parole revocation also resulted in a violation of Petitioner's
25 constitutional right to bail on the new charges. The State opposed, arguing that NRS § 178.484(2)
26 prevents a parolee from receiving bail unless ordered by the court, the Parole Board, or the Division
27 of Parole and Probation, and that no such order was issued.

28 27. The Court does not believe Petitioner's constitutional right to bail was violated by
the Parole Board, but because the Court finds the Parole Board exceeded its authority under NRS
§ 213.1517, the Court will not decide on the merits of that issue at this time.

ORDER

28. THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby GRANTED. The Court orders that based on its findings and conclusions the Petitioner is entitled to recalculation of his time served for the parole violation and sentence entered in this case as follows:

- a. Petitioner's parole revocation hearing should have been held on June 12, 2018, which is 60 days from April 13, 2018, the date he returned to the custody of NDOC.
- b. The period of Petitioner's parole revocation penalty should have run from June 12, 2018, the date his parole revocation hearing should have been held, to June 17, 2019, the date his one-year penalty would have expired.
- c. NDOC shall ensure that in Case Nos. 07C232109, 07C232113, 07C232319 and 08C240508 Petitioner has been awarded flat time and statutory credit from June 12, 2018, the date his parole revocation hearing should have been held, to June 17, 2019, the date his one-year penalty would have expired.

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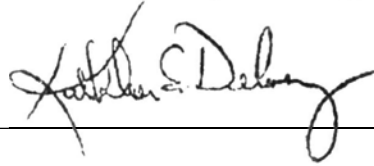
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- 1 d. NDOC shall also ensure that in Case No. 19C337302, Petitioner has been awarded flat
2 time and statutory credit from June 24, 2019, the date he entered his plea, to the present
3 date.

4 Dated this 17th day of February, 2021

5 
6

7 0BB 329 BD7D 12F3
8 Kathleen E. Delaney
9 District Court Judge

10 **MCAVOY AMAYA & REVERO ATTORNEYS**
11 **MICHAEL J. MCAVOY-AMAYA, ESQ.**
12 Nevada Bar No. 14082

13 BY: /s/ Michael J. McAvoy-Amaya
14 MICHAEL J. MCAVOYAMAYA, ESQ.
15 Nevada Bar No.: 14082
16 *Attorney for Petitioner*

17 Katrina A. Samuels
18 Deputy Attorney General
19 State of Nevada
20 Nevada Bar No. 13394

21 BY: /s/ Katrina A. Samuels
22 KATRINA A. SAMUELS, ESQ
23 Nevada Bar No.: 13394
24 *Attorney for Respondent*
25
26
27
28

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 State of Nevada

CASE NO: C-19-337302-1

7 vs

DEPT. NO. Department 25

8 Breck Smith
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 2/17/2021

15 Marsha Landreth

mlandreth@ag.nv.gov

16 Rikki Garate

rgarate@ag.nv.gov

17 Katrina Samuels

KSamuels@ag.nv.gov

18 Cheryl Martinez

cjmartinez@ag.nv.gov

19 Lucas Combs

ljcombs@ag.nv.gov

20 Michael Mcavoyamaya

mike@mrlawlv.com

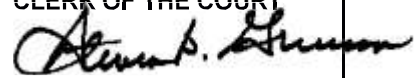
21 Timothy Revero

tim@mrlawlv.com

22 Steve Wolfson

23 motions@clarkcountyda.com
24
25
26
27
28

Exhibit 7



1 **NOASC**
2 **AARON D. FORD**
3 Attorney General
4 Katrina A. Samuels (Bar No. 13394)
5 Deputy Attorney General
6 State of Nevada
7 Office of the Attorney General
8 555 E. Washington Ave., Ste. 3900
9 Las Vegas, Nevada 89101-1068
10 (702) 486-3770 (phone)
11 (702) 486-2377 (fax)
12 KSamuels@ag.nv.gov
13 Attorneys for Respondents

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 BRECK SMITH,

11 Petitioner,

12 vs.

13 STATE OF NEVADA,

14 Respondents.

Case No. C-19-337302-1

Dept. No. XXV

NOTICE OF APPEAL

15
16 Notice is hereby given that the State of Nevada, Respondents above named, hereby appeal to the
17 Supreme Court of Nevada from the order granting Petitioner Breck Smith's post-conviction petition for
18 a writ of habeas corpus, entered in this action on February 17, 2021.

19 RESPECTFULLY SUBMITTED this 26th day of March 2021.

20 AARON D. FORD
21 Attorney General

22 By: /s/ Katrina A. Samuels
23 Katrina A. Samuels
24 Deputy Attorney General
25
26
27
28

Exhibit 8

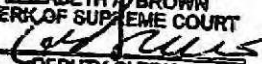
IN THE SUPREME COURT OF THE STATE OF NEVADA

GRADY EDWARD BYRD,
Appellant,
vs.
CATERINA ANGELA BYRD,
Respondent.

No. 81198

FILED

AUG 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from district court orders awarding attorney fees. Eighth Judicial District Court, Clark County; Rhonda Kay Forsberg, Judge.

When this court's initial review of the docketing statement and documents before this court revealed a potential jurisdictional defect, this court ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. Specifically, it appeared that the notice of appeal was untimely filed.

Notice of entry of the challenged orders was served electronically on March 18 and 27, 2020, respectively. Thus, the notices of appeal were due to be filed in the district court by April 17 and 27, 2020, respectively. See NRAP 4(a)(1); NRAP 26(a)(1)(C); NRCP 6(a)(1)(C). However, appellant did not file the notice of appeal in the district court until May 14, 2020, well past the deadline. Appellant suggested in his docketing statement that the notice of appeal is timely pursuant to the governor's Declaration of Emergency Directive 009 (Revised). Section 2 of that directive states that "[a]ny specific time limit set by state statute or regulation for the commencement of any legal action is hereby tolled from [April 1, 2020] until 30 days from the date the state of emergency declared

on March 12, 2020 is terminated.” This court noted that the time limitation to file a notice of appeal is not established by state statute or regulation, but by court rule. Thus, the directive did not appear to apply to the time to file a notice of appeal.

In response to the order to show cause, appellant concedes that the notice of appeal was untimely filed. However, appellant notes that the challenged orders were entered “immediately following the eruption of the pandemic and the executive orders issues by Governor Sisolak essentially closing down business.” He asserts that because of the emergency order and an “initial lack of clarity as to who could continue to operate during the shutdown,” he did not immediately receive notice of entry of the orders and did not correctly calendar the response dates. Appellant also represents that the district courts “adopted and applied [directive 009] to the existing court rules.” Appellant suggests that this court “adopt the suspension of timing rules that was uniformly adopted in the district court.”

Respondent replies that appellant was actively involved in the litigation in this matter during the relevant time frame and does not demonstrate that he was prevented from timely filing the notice of appeal. Respondent contends that the governor’s Declaration of Emergency Directive 009 (Revised) does not affect the time to file a notice of appeal and the Eighth Judicial District Court’s Administrative order does not apply to jurisdictional requirements.

Appellant’s notice of appeal was untimely filed. *See* NRAP 4(a)(1). The Declaration of Emergency Directive 009 (Revised) does not apply to deadlines established by this court’s rules. And this court is unable to extend the deadline to file a notice of appeal. NRAP 26(b)(1)(A) (“[T]he court may not extend the time to file a notice of appeal except as provided

in Rule 4(c)."). Accordingly, this court lacks jurisdiction, *see Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 330, 741 P.2d 432 (1987), and

ORDERS this appeal DISMISSED.


Parraguirre


Hardesty, J.


Cadish, J.

cc: Hon. Rhonda Kay Forsberg, District Judge
Mills & Anderson Law Group
Webster & Associates
Eighth District Court Clerk